

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT III**

IA. No. 555/2023

In

CP(IB)No. 1667/I&B/MB/2018

*(Application filed under section 60(5) of Insolvency
and Bankruptcy Code, 2016.)*

Small Industries Development Bank of India

...Applicant

V/s

Amit Gupta,

(Liquidator of Provogue (India) Ltd.)

... Respondent

In the matter of

Andhra Bank

...Financial Creditor

V/s

Provogue (India) Ltd.

...Corporate Debtor

Order delivered on: 31.10.2023

CORAM:

SHRI CHARANJEET SINGH GULATI

HON'BLE MEMBER (T)

SMT LAKSHMI GURUNG

HON'BLE MEMBER (J)

Appearances:

For the Applicant : Adv. Shavez Mukri i/b A&G Legal Associates LLP

For the Respondent : Adv. Saurabh Bachhawat

ORDER

Per- Coram

1. This is an application filed by the Small Industries Development Bank of India, (**'SIDBI/Applicant'**) under sections 60(5) of Insolvency and Bankruptcy Code, 2016 (**"the Code/IBC"**) against the Liquidator (**'Respondent'**) of Provogue (India) Ltd. (**'Corporate Debtor'**), seeking direction to the Respondent *inter alia* to treat the Applicant as a secured creditor under Section 53(1)(b)(ii) of the Code for the purpose of distribution of proceeds from the sale of the liquidation assets and consequential reliefs.

Background Facts:

2. The liquidation order of the Corporate Debtor was passed by this Tribunal on 14.10.2019 and the Respondent was appointed as Liquidator. On 26.10.2019, the Liquidator made the Public Announcement and invited claims, pursuant to which the claims were received from the Applicant, as a secured Financial Creditor, amounting to INR 4,93,06,250.15.
3. The claims of SIDBI arose out of bill discounting facility extended to the Corporate Debtor under 'MSME Receivable Finance Scheme' and was secured by way of the following:

- i. Bills of Exchange accepted by the Corporate Debtor;
 - ii. Residual charge on the movable and current assets of the Corporate Debtor, both present and future;
 - iii. Personal Guarantee of Shri Nikhil Anupendra Chaturvedi, (erstwhile) Managing Director of the Corporate Debtor;
 - iv. Equity shares of 1.30% of the Corporate Debtor.
4. The claim of SIDBI was admitted by the Liquidator. While submitting the Form D with the Liquidator, the Applicant had chosen not to relinquish the security interest and had therefore mentioned 'NO' under column 8A, which reads as '*Whether security interest relinquished*'. Extract of Form D is reproduced below:-

FORM D
PROOF OF CLAIM BY FINANCIAL CREDITORS

8A.	WHETHER SECURITY INTEREST RELINQUISHED	NO
-----	--	----

Clearly Applicant **did not relinquish** its security interest to the liquidation estate of the Corporate Debtor.

5. On 07.01.2020, the Liquidator filed a report regarding the constitution of the **Stakeholders Consultation Committee ("SCC")** pursuant to Regulation 31A of the IBBI (Liquidation Process) Regulations, 2016 (hereinafter referred to as the '**Liquidation Regulations**') along with the List of Stakeholders. Since SIDBI had chosen not to

relinquish its security to the liquidation estate of the Corporate Debtor, it was not included as a member of the SCC.

6. The Applicant received an email on 20.10.2022 from the Liquidator mentioning therein that as per amended the IBBI (Liquidation Process) (Second Amendment) Regulations, 2022 issued on 16.09.2022 and in compliance to the same, the Liquidator in accordance with Regulation 31A of Liquidation Regulations has re-constituted the Stakeholders Consultation Committee and now the said Committee includes the Applicant herein. In furtherance to the above mail a meeting of all the Stakeholders Consultation committee was held on 27.10.2022 and the Applicant also attended the same through its representative.
7. Thereafter, the Applicant sent an email on 28.10.2022 to the Liquidator with respect to the distribution to secured lenders in Liquidation and further requested to allocate the amount to the Applicant on pro-rata basis towards its claim. The Applicant also relied on NCLAT judgement dated 26.05.2022 in the matter of **Bala Techno Industries Ltd.** for distribution on pro-rata basis.
8. In response to above email, the Liquidator replied on 09.11.2022 as follows:

*“We would like to inform you that Small Industrial Development Bank of India (“SIDBI”) had submitted its claim amounting to INR 4,93,06,250.15 in Form D as a financial creditor in the matter of liquidation of Provogue (India) Limited vide email dated 11.12.2019, which was duly admitted by the undersigned. As per point 8A of the said Form D, SIDBI has **NOT** relinquished security interest in the assets of the Corporate Debtor.*

...

....

As SIDBI has not relinquished its security interest to the liquidation estate, therefore, in the event the proceeds realised by SIDBI from the secured assets are inadequate for repayment of the debts owed to SIDBI, then it’s unpaid debts shall be paid by the liquidator in accordance with Section 53(1)(e) of the Code.

Further, as you would be aware that the liquidation proceedings of the Corporate Debtor had commenced on 14th October 2019 and your good office has now raised an objection and requested for distribution on a pro-rata basis when 3 years has already lapsed since the commencement of liquidation.”

9. The Applicant sent another email on 16.11.2022 to the Liquidator pointing out that the Applicant has not complied with the Regulation 21A(2) of the Liquidation Regulations and as such the security formed part of the Liquidation Estate.
10. The Liquidator responded to the Applicant’s email on 17.11.2022 as follows:

“As we understand that you are willing to relinquish the security interest which was not done earlier and have given reference of judgement of NCLAT Principal Bench, New Delhi for distribution of proceeds among all financial creditors without considering the charge structure. Please note that the abovementioned judgement is out of an appeal filed by

a financial creditor and order is rejection of the appeal without dealing and detailing the facts of the case. Hence the stay granted by the Supreme Court on the order of the Appellate Tribunal on “Technology Development Board” is sacrosanct. Further the matter has not yet attained finality, hence its difficult to take a contrary view until there is specific order to that effect in the matter of Provogue India Limited.”

11. The Liquidator realized the error in including the Applicant as a member of SCC and re-constituted the SCC by removing SIDBI from the SCC. The Liquidator filed an application bearing No. IA/321/2023 to place on record the revised report with respect to the re-constitution of the SCC. The revised SCC reconstitution report was taken on record by this Tribunal on 30.01.2023.

12. **Submissions of the Applicant**

12.1 The Applicant submits that though admittedly, it did not relinquish its security interest to the liquidation estate but neither did it take steps to realise its security interest nor the Liquidator called upon the Applicant to do so.

12.2 The Applicant relies on Regulation 21A(3) of the Liquidation Regulations to contend that since Applicant being a secured creditor, failed to comply with sub regulation 2 of Regulation 21(A), the assets of the Corporate Debtor, which are subject to security interest, have become part of the Liquidation estate.

12.3 The Applicant further submits that the Liquidator has made the Applicant as a part of Stakeholder’s Consultation

Committee in accordance with Regulation 31A which specifically mentions that *“Provided a secured creditor who has not relinquished his security interest under section 52 shall not be part of the consultation committee”*. By making the Applicant a member of Consultation Committee the Liquidator has already accepted it as a secured creditor who has not relinquished its security interest and cannot now dispute the said position. Moreover, the Liquidator is obligated by Regulation 31A(5) and 34(5) of the Liquidation Regulations to provide access to all relevant records to the Applicant. Similarly, when the Applicant requested to provide the minutes of all the SCC meetings, the liquidator refused and stated that the Applicant was not a part of the Stakeholders Consultation Committee hence minutes and notice were not shared with the Applicant. The Applicant further submits that the Liquidator has failed to understand that the Applicant has been admitted to the SCC and the Liquidator is duty bound to provide all the relevant records.

- 12.4 The Applicant submits that the Liquidator/respondent is blowing hot and cold at the same time, as the liquidator mentions that the Applicant has not relinquished security interest in the assets of the corporate debtor and therefore will be paid by the liquidator in accordance with Section 53(1)(e) and simultaneously also considers the Applicant as a secured creditor under section 53 and denies any amount to be paid to the Applicant on pro-rata basis. As neither the

applicant has taken any steps to realise its security interest nor the Respondent has called upon to do so and as such by operation of law the Applicant's Security interest has formed part of the liquidation estate. Therefore, the Applicant falls under Section 53(1)(b)(ii) of the Code.

12.5 The Applicant has been wrongly treated as a creditor under section 53(1)e(ii) of the Code for the purpose of the distribution of the assets of the Corporate Debtor.

13. **Liquidator's Submission:**

13.1 The Respondent/Liquidator has filed a detailed reply and has submitted that in view of the proviso to Regulation 31A(2) of the Liquidation Regulations, the Applicant is not and cannot be a member of the SCC of the Corporate debtor since it had chosen not to relinquish its security interest to the liquidation estate of the Corporate Debtor. The inclusion of the Applicant as a member of the SCC and participation in some SCC meetings was the result of an inadvertent error which has been rectified and the corrected report with respect to the reconstitution of the SCC has been taken on record by order dated 30.01.2023 passed in IA/321/2023.

13.2 The Respondent further submits that as per the Code read with the Liquidation Regulations, the onus is on the secured creditor who opts out of the liquidation proceedings to take steps to realize its security interest.

There is no provision in the Code or the Liquidation Regulations which compels the Liquidator to ask and/or follow up with a secured creditor who opts out of the liquidation process to take steps to realize its security interest. On the contrary, it is evident from a reading of Section 52 of the Code as also the provisions of Regulation 21A and Regulation 37 of the Liquidation Regulations that the onus is on the secured creditor who does not relinquish its security to realise its security interest.

13.3 The Respondent submitted that SIDBI's charge on the Corporate Debtor's movable assets is only residual in nature and those lenders having first charge on assets of the Corporate Debtor are not getting paid in full in the present case, therefore, value of SIDBI's security and the amount payable to SIDBI under Section 53 of the Code would be NIL even if SIDBI had relinquished its security interest to the liquidation estate. That is why Liquidator did not raise any demand on SIDBI for contributing towards liquidation cost under Regulation 21A of the Liquidation Regulations.

13.4 The Respondent further submits that the Applicant had indicated in its claim form that Applicant is not relinquishing its security interest to the liquidation estate and in the absence of any steps taken by the Applicant to participate in the liquidation proceedings of the Corporate Debtor, the Applicant cannot now, after over three years,

claim benefit from its own failure to realise its security interest.

- 13.5 The Liquidator further submits that Regulation 21A was introduced in the Liquidation Process Regulations by way of IBBI Notification No. IBBI/2019-20/GN/REG047 dated 25.07.2019 and subsequently amended by way of notification No. IBBI/2019-20/GN/REG053, dated 06.01.2020. The provisions of Regulation 21A requiring a secured creditor to inform the liquidator, by way of its claim form, as to whether it was relinquishing its security interest to the liquidation estate or realising its security interest outside the liquidation process and the provisions regarding contribution of amounts specified in Regulation 21A(2) were introduced in the interest of conducting the liquidation process in a certain and time bound manner. It cannot be read in a manner so as to benefit a creditor such as the Applicant who had clearly intimated over three years back that it was not relinquishing its security interest to the liquidation estate of the Corporate Debtor. The Liquidator finally submits that the Applicant is therefore covered under Section 53(1)(e)(ii) of the Code for the purpose of waterfall mechanism under the Code.

Analysis & Findings:

14. We have considered the submissions of the Ld. Counsel for the parties and perused the record.

15. We have carefully examined the provisions of the Code and the Regulations, relevant for adjudication of the present case which are Section 52, 53 and Regulation 21A of the Liquidation Regulations and are reproduced below for ease of reference:

Section 52. Secured creditor in liquidation proceedings.

(1) A secured creditor in the liquidation proceedings may—

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or

(b) realise its security interest in the manner specified in this section.

(2) Where the secured creditor realises security interest under clause (b) of sub-section (1), he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

(3) Before any security interest is realised by the secured creditor under this section, the liquidator shall verify such security interest and permit the secured creditor to realise only such security interest, the existence of which may be proved either—

(a) by the records of such security interest maintained by an information utility; or

(b) by such other means as may be specified by the Board.

(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.

(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing of the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.

(6) The Adjudicating Authority, on the receipt of an application from a secured creditor under sub-section (5) may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.

(7) Where the enforcement of the security interest under sub-section (4) yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—

(a) account to the liquidator for such surplus; and

(b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.

(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of sub-section (1) of section 53.

16. Section 52(1) has two alternate clauses. Clause (a) covers a situation when Secured Creditor relinquished its security interest and Clause (b) covers the situation when Secured Creditor realises its security interest in the manner specified under Section 52. A secured creditor has been given an option either to relinquish its security or to realise its security. Correspondingly, there are two categories of secured creditors under section 53(1) of the Code:

53. Distribution of assets

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:-

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:-

(i) workmen's dues for the period of twenty -four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:-

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1) and the proceeds to the relevant recipient shall be distributed after such deduction.

17. Based on the option exercised by the secured creditor under section 52(1)(a) or 52(1)(b), they are separately covered under two distinct categories. First category of the secured creditors is those who have relinquished the security interest under section 52(1)(a) of the Code and are covered under section 53(1)(b)(ii), who shall rank equally between and among the workmen's dues for the period of twenty-four months preceding the liquidation commencement date as mentioned under 53(1)(b)(i).

18. The second category is debts owed to secured creditors for any amount unpaid following the enforcement of security interest – for those secured creditors who exercised the option under section 52(1)(b) are covered under 53(1)(e)(ii) who would shall rank equally between and among any amount due to the Government for the period of two years preceding the liquidation commencement date.

19. The scheme of the Code is clear. The secured creditor has to either relinquish the security interest and be covered under section 53(1)(b)(ii) or enforce it and for balance due fall under section 53(1)(e)(ii). There is no third option for a secured creditor either under section 52 or under section 53 nor is there any deeming provision that in case the secured creditor, after having exercised its option under 52(1)(a) not to relinquish security interest, if fails to realise the security interest then it would be deemed to have relinquished the secured interest and its debt would be covered under section 53(1)(b)(ii). In the present case, the Applicant having exercised its option under section 52(1)(a) not to relinquish the security interest is covered under section 53(1)(e)(ii).

20. A Secured Creditor falls under Section 53(b)(ii) only when the secured creditor has relinquished security in the manner specified in section 52. However, in the present case, the Applicant opted not to relinquish the security interest in the assets of the Corporate Debtor and indicated 'NO' in column 8A, which pertains to *whether security*

interest is relinquished in Form D. Therefore, at this stage, the Applicant cannot assert that they will be covered under Section 53(b)(ii) for distribution of assets.

21. The Applicant's reliance on Regulation 21A(3) of the Liquidation Regulations to contend that the asset which were subject to security interest, have become part of liquidation estate and therefore by operation of law it should be covered under 53(1)(b)(ii) is mis-conceived. Regulation 21A is reproduced below:

21A. Presumption of security interest.

(1) A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:

PROVIDED that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.

- (2) Where a secured creditor proceeds to realise its security interest, it shall pay –*
- (a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and*
 - (b) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one*

hundred and eighty days from the liquidation commencement date:

PROVIDED that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:

PROVIDED FURTHER that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.

(3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.

22. Regulation 21A, was introduced w.e.f. 25.07.2019. Prior to this there was no clarity about timeline within which the secured creditor could take decision about exercising its option under section 52. The purpose of insertion of this Regulation appears to be to discipline the secured creditors to take timely decision as to whether to relinquish or to realise its security interest. If a secured creditor fails to intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security shall become part of liquidation estate.
23. As per sub-regulation (2) of Regulation 21A, if the Secured Creditor proceeds to realise its security then it shall pay to the liquidator within 90 days from the liquidation

commencement date, as much amount as would have been payable under Section 53 as if it had relinquished the security interest. Further timeline of 180 days is provided payment of excess realised value of assets. The First proviso states that where amount payable is not certain, Secured Creditor will pay the amount as estimated by the Liquidator.

24. As per sub-regulation (3) of Regulation 21A, if the Secured Creditor fails to comply with Sub Regulation (2) then the asset, which is subject to security interest shall become part of liquidation estate. In other words, if the Secured Creditor realises its security interest but fails to pay its share towards CIRP cost under section 53(1)(a) and towards workmen's dues u/s 53(1)(b)(i), then such assets shall become part of liquidation estate which are subject to security interest. In the absence of timeframe for the secured creditors to intimate their decision, it would hinder the time bound process of liquidation.

25. In the present case, the Applicant, a secured creditor has already intimated the Liquidator its decision not to relinquish its security interest, in Form D. Therefore it is not open to the Applicant to now claim after three years that since they failed to comply with Regulation 21A(2), therefore by virtue of sub-regulation (3) they should be deemed as creditors having relinquished the security interest for the purpose of distribution of assets of the Corporate Debtor. This is neither expressly provided in the

Code or Regulations nor can be the intent of the Code. Any other interpretation would encourage the secured creditors to exercise option under section 52(1)(b) i.e. not to relinquish the security interest and then wait and watch before enforcing its security interest and in case of its failure to take timely action, it would claim to be covered under section 53(1)(b)(ii) which cannot be the intent of the Code. If a secured creditor has exercised option under section 52(1)(a) i.e. relinquished the security interest, then consequently its position would be under 53(1)(b)(ii) and if a secured creditor has exercised option 52(1)(b) i.e. not to relinquish the security then its position would be under 53(1)(e)(ii).

26. There is another aspect to the present case. The nature of the security interest was residual charge on the movable and current assets of the Corporate debtor. The Second Charge holder is sub servient to the First Charge holder and is dependent on satisfaction of the First Charge Holder from proceeds of such assets which may not be sufficient to pay to the second charge holder. In such case also, the Applicant would be a secured creditor falling under section 53(1)(e)(ii).
27. From whatever angle we see on the plain reading of Sections 52, 53 and Regulation 21A or applying the intent and object of the Code, the Applicant is covered under 53(1)(e)(ii) of the Code.

28. In the email dated 28.10.2022 addressed to the Liquidator the Applicant has relied on judgment of Hon'ble NCLAT in the matter of **Bala Techno Industries Ltd. (Comp. App. (AT)(Ins.) No. 547 of 2022)**. However, at the time of oral submissions, the counsel only relied on the provisions of Code and Liquidation Regulations and did not press on any case law. We have considered the judgments of **Bala Techno Industries Ltd.** and **Technology Development Board Vs. Mr. Anil Goel & Ors.** as mentioned in the email exchange of the Applicant and the Respondent. None of those judgments are applicable in the present case as in those cases, the facts were different as secured creditor there had relinquished the security interest and was claiming full value of security instead of what is provided under section 53 of the Code.
29. Further, the Regulation 21A was introduced in the interest of conducting the liquidation process in a certain and time bound manner. Therefore, the Applicant, who decided not to relinquish its security interest, cannot now, after a lapse of over three years, seek to benefit from its own failure to realize security interest. It is fundamental principal of law that one cannot derive advantages or benefits from their own wrongdoing/failure. For the afore mentioned reasons, we are unable to agree with the Applicant that they are entitled to receive the sale proceeds of assets of Corporate Debtor in proportionate to the claims of Secured Creditors

as distributed to other secured creditors in terms of Section 53(1)(b)(ii) of IBC Code, 2016.

30. Accordingly, the present Application- **IA/555/2023** is hereby **dismissed**.

Sd/-

CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)

Sd/-

LAKSHMI GURUNG
(MEMBER JUDICIAL)

Arpan,LRA